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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. -

JAMES G. HAWLEY, PETITIONER

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Submitted by:

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50 pp

QUESTIONS PRESENTED

I. Whether the trial court's instruction on interstate commerce created an unconstitutional conclusive presumption in violation of the Fifth Amendment.

II. Whether cross-examination of a defendant concerning alleged other criminal activity is permissible without any evidence connecting the defendant to such other crimes.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985
NO.

JAMES G. HAWLEY,
PETITIONER,
V.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner James G. Hawley prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit rendered on April 5, 1985.[1]

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1. In addition to the United States of America and the petitioner, Gus Curcio was a party to the proceedings below. Mr. Curcio is not a party to this Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 759 F.2d 237 (1985) and is attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was rendered on April 5, 1985, and petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc was denied on May 28, 1985. (A copy of the order denying said Petition is attached as Appendix B.) The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Section 1951 of Title 18 of the United States Code provides, in pertinent part, as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.
>
> (b) As used in this section--
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by

wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

This case also involves interpretation of two rules of the Federal Rules of Evidence, Rule 403 and Rule 404. Rule 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 provides, in pertinent part, as follows:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in

> conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

Petitioner Hawley was tried in the District of Connecticut for attempted extortion affecting interstate commerce, in violation of 18 U.S.C. Section 1951. Hawley was convicted on June 15, 1984 after jury trial. The Government's claim was that Hawley and co-defendant, Gus Curcio, had attempted to commit extortion by damaging an electronic video ("Asteroids") machine at the Blue Ribbon Bar in Bridgeport, Connecticut in order to intimidate the bar's owner into utilizing only machines rented from defendants' vending machine business (Hawley Enterprises). Hawley testified in his own defense, admitting his presence in the bar, but denying any

advance knowledge that the machine would be damaged by his companion, Dahill D'Onofrio, or any intent to extort the bar owner.

The question of whether the Government had proved interference with interstate commerce -- the jurisdictional predicate for a Hobbs Act -- violation was hotly contested at trial. Hawley's trial counsel devoted his closing argument almost entirely to this issue. While the Government offered proof at trial that the Blue Ribbon Bar purchased liquor from in-state wholesalers who obtained the liquor from out-of-state sources, there was little, if any, evidence to prove that the defendants' actions had any actual or potential impact on the interstate transactions generated by the bar. The Government offered no evidence that defendant's

alleged acts had any effect on the liquor sales by the bar or on the amount of liquor purchased by the bar from the wholesalers. There was no evidence of any causal relationship between the bar's liquor business and the damaging of the video machine. Indeed, there was no evidence or claim that the damage to the machine in any way impacted on the bar's liquor business.

The trial court's instruction on the interstate commerce element of the offense effectively removed the issue from the jury's consideration, creating an improper irrebutable presumption. Over defense counsel's objection, the trial court advised the jury that it could find an effect on interstate commerce if it found that the Blue Ribbon Bar used commodities that had traveled, at any point in time, in interstate commerce:

> During the trial you have heard evidence that the Blue Ribbon Restaurant at 1196 East Main Street, Bridgeport, Connecticut, regularly used quantities of liquor and other commodities which had traveled in interstate commerce. If you find the Government proved such evidence beyond a reasonable doubt, you may find the requisite effect on interstate commerce.

The jury was, thus, allowed to find the interstate commerce element satisfied by the mere existence of interstate purchases by the wholesalers selling to the bar. Petitioner's exception to this instruction was duly noted.

This irrebutable presumption was endorsed by the Second Circuit Court of Appeals in its decision affirming Hawley's conviction. The Court of Appeals rejected petitioner's argument that the jury must be instructed to find not only that the bar purchased commodities in interstate commerce, but also that the alleged extortion would

have some potential or actual impact on the bar's participation in such commerce. Instead, the Court of Appeals explicitly approved the trial court's ruling that the requisite effect can be found solely in evidence of interstate purchases by the bar.

In addition, defendant Hawley challenged below the propriety of the Government's use of other crimes evidence during its cross-examination of defendant Hawley and principal Curcio defense witness, Dahill D'Onofrio. Based upon the Government's representation that these other crimes would be tied directly to the defendants, the trial court allowed the Government to cross-examine on two alleged incidents involving acts of violence to former customers of Hawley Enterprises. Following this highly prejudicial questioning, the Jencks Act

material produced by the Government revealed that the extrinsic crimes were committed by unidentified, masked men and that the Government possessed no evidence linking either defendant or D'Onofrio to the occurrences.[2] Following this disclosure, the trial court struck the questions and instructed the jury to disregard them. The trial court refused, however, to declare a mistrial despite the highly prejudicial nature of the Government's questions.

While the Court of Appeals found that the Government had grounds to believe that disputes over Hawley machines had resulted in the two violent incidents, it

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2. The Court of Appeals assumed that the Jencks material concerning the extrinsic crimes was provided to the defense prior to trial. In fact, the Jencks material was provided on the evening after D'Onofrio finished testifying. The defense had rested at the time it received the Jencks material.

acknowledged that the Government had no "proof that the defendants or D'Onofrio had committed or ordered the violent acts." Id. at 240. Despite these facts, the Court of Appeals held that the Government's questioning was proper. In reaching this decision, the panel relied solely on the fact that Hawley was a part-owner and president of Hawley Enterprises, and D'Onofrio was a part-owner and self-described "problem solver" for the firm. Id. at 241. On the basis of these business relationships, the Court of Appeals imputed knowledge and responsibility for the extrinsic crimes to Hawley, D'Onofrio and Curcio in an unprecedented departure from the principle of individuality of guilt.

Hawley's petition for rehearing and suggestion for rehearing in banc was denied on May 28, 1985.

REASONS FOR GRANTING THE WRIT

A. The Decision of the Court of Appeals Creates an Unconstitutional Irrebutable Presumption

A conclusive presumption in a criminal case is clearly unconstitutional. Sandstrom v. Montana, 442 U.S. 510, 521-24 (1979). Such a presumption exists when, as here, the jury is instructed to find an element of an offense from proof of facts which fall short of establishing that element. Id. The decision of the Court of Appeals approving the trial court's use of a conclusive presumption in its instruction on interstate commerce is, therefore, clear error and should be reviewed and reversed.

The Court of Appeals based its decision on the general principle that the "effects on interstate commerce of the defendants' extortionate behavior

need only be 'potential or subtle'" and that in an attempt case, "an actual effect need not be shown, only a probability thereof." Id. at 241-42. While petitioner has no quarrel with these assertions, they do not relieve the trial court from the obligation of instructing the jury to find facts necessary to establish such a potential, subtle or possible effect on interstate commerce. Thus, in each of the cases cited by the Court of Appeals, and known to petitioner, the jury was required to find both (1) use of goods that had traveled in interstate commerce and (2) an extortionate act which, if successful, would involve payment of money or would otherwise deplete the victim's assets so that he would be able to buy or sell fewer commodities in interstate commerce. See United States v. Jannotti,

673 F.2d 578, 590 (3d Cir. 1982) (conspiracy "would affect commerce by depleting the funds available . . . for project" involving interstate commerce); United States v. Angelilli, 660 F.2d 23, 35 (2d Cir. 1981) (defendant obtained money from victims engaged in interstate commerce); United States v. Rosa, 560 F.2d 149, 153 (3d Cir. 1977) (attempt to extort $10,000.00); United States v. Augello, 451 F.2d 1167, 1169 (2d Cir. 1971) (jury instructed element established by interstate purchase of goods and extortion of victim's money).

Petitioner is aware of no other decision in which a Circuit Court has approved an instruction that did not require the jury to find some connection or potential connection between the use of interstate goods and the alleged extortion. Compare United States v.

Boston, 718 F.2d 1511, 1516-17 (10th Cir. 1983) (jury instructed element established by particular interstate transaction and effect); United States v. Starks, 515 F.2d 112, 124 (3d Cir. 1975) (evidence sufficient but "extremely thin" where victim-bar's wholesalers purchased liquor out-of-state and victim's sales declined because of extortion, thereby reducing wholesaler's sales to victim); United States v. Cerillo, 603 F.2d 415, 424 and n. 10 (3d Cir. 1979); United States v. Amato, 495 F.2d 545, 547-48 (5th Cir. 1974) (victim-restaurant forced to close because of extortion; cessation of intra-state sales decreased wholesalers' interstate transactions); see also United States v. Demasi, 445 F.2d 251, 257 (2d Cir. 1971) (victim-club purchased food and liquor from out-of-state source and club forced to close because of extortion).

The Court of Appeals' decision violates the fundamental constitutional prohibition against conclusive presumptions and condones removal of an essential element of an offense from consideration by the jury. The decision should be reviewed and reversed.

B. The Court of Appeals Has Approved an Unprecedented Use of Other Crimes Evidence Without Any Requirement That the Defendant Himself Has Committed the Acts

The Government was allowed to introduce evidence of other crimes on the basis of its representation that those crimes could, and would, be connected to the defendants. In fact, the government never had evidence connecting either defendant with these acts. Despite this misrepresentation, and the highly prejudicial nature of the evidence, the Court of Appeals held that the Government's questioning was proper.

The Court of Appeals relied upon guilt by association to support its holding that the Government's questioning on extrinsic crimes had any probative value. It is axiomatic that such evidence is inadmissible unless its probative value is not substantially outweighed by the danger of unfair prejudice. United States v. Figueroa, 618 F.2d 934, 942 (2d Cir. 1980); accord, United States v. Levy, 731 F.2d 997, 1004 (2d Cir. 1984). In applying this principle, the courts have uniformly held that "as a predicate to a determination that the extrinsic offense is relevant, the Government must offer proof that the defendant committed the offense." United

States v. Beechum, 582 F.2d 898, 912-13 (5th Cir. 1978).[3]

In this case, without citing any precedent, the Court of Appeals has departed from this rule, holding that extrinsic crimes are relevant to intent merely on the basis of the Government's good faith belief that they resulted from disputes between the victims and a business partly owned by the defendants.

This decision is in sharp conflict with the position taken by the Fifth Circuit Court of Appeals in Beechum and its progeny. In United States v. Beechum, the Fifth Circuit held:

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3. Accord, United States v. Cote, 744 F.2d 913 (2d Cir. 1984); United States v. Krezdorn, 639 F.2d 1327, 1333 (5th Cir. 1981); United States v. Shavers, 615 F.2d 286, 271 (5th Cir. 1981); United States v. Brown, 608 F.2d 551, 555 (5th Cir. 1979); United States v. Lord, 565 F.2d 831, 835-36 (2d Cir. 1977); see also Michelson v. United States, 335 U.S. 469, 480-81 (1948); United States v. Rosse, 418 F.2d 38, 40-41 (2d Cir. 1969).

> Obviously the reasoning that deems an extrinsic offense relevant to the issue of intent is valid only if an offense was in fact committed and the defendant in fact committed it. Therefore, as a predicate to a determination that the extrinsic offense is relevant, the Government must offer proof demonstrating that the defendant committed the offense.

Id. at 912-13. The Fifth Circuit has consistently adhered to this position which, until this case, was followed also by the Second Circuit Court of Appeals. See, e.g., United States v. Cote, supra; United States v. Krezdorn, supra. The decision in this case thus represents a sudden departure from precedent and creates a conflict between the circuits on this crucial issue.

The Court of Appeals' decision in this case is also in direct conflict in the principle of individuality of guilt. The Court of Appeals has dispensed with any requirement that the individual whose intent is at issue be connected to the

extrinsic crimes by anything more than mere association with a business which the Government believes is involved in the acts.

Moreover, the Court did not even impose a requirement that the jury be informed that, in this case, the identity of the perpetrators of the other crimes was unknown. The panel, instead, condoned questioning which directly insinuated that the defendants were responsible for the extrinsic crimes. The error in this case is particularly egregious in view of the Government's false representations to the trial court that it could connect the defendants directly to the extrinsic crimes.

The Court of Appeals has erroneously allowed the Government to inject highly disfavored evidence into a trial without demonstrating its probative value. This unprecedented decision should be reviewed and reversed.

CONCLUSION

For the foregoing reasons, petitioner prays that his Petition for a Writ of Certiorari be granted, or, in the alternative that this Court summarily reverse the decision of the Court of Appeals.

Respectfully submitted

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CERTIFICATION

This is to certify that three copies of the foregoing Petition for a Writ of Certiorari were mailed, postage pre-paid, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to John H. Durham, Esq., and William A. Keefer, Esq., United States Department of Justice, 142 Orange Street, New Haven, Connecticut 06507, this 26th day of July, 1985.

DAVID S. GOLUB

APPENDICES

APPENDIX A:

UNITED STATES OF AMERICA, Appellee,

v.

GUS CURCIO, Appellant.

UNITED STATES OF AMERICA, Appellee,

v.

JAMES HAWLEY, Appellant.

NOS. 84-1261 and 84-1263

United States Court of Appeals

Second Circuit

Submitted Jan. 22, 1985.

Decided April 5, 1985.

Defendants were convicted in the United States District Court for the District of Connecticut, Ellen B. Burns, J., of attempting to violate the Hobbs Act, and they appealed. The Court of Appeals, Winter, Circuit Judge, held that: (1) cross-examination of defendants regarding other incidents of

violence directed at taverns which had caused machines owned by one defendant to be removed from taverns was proper; (2) Government could elicit testimony from bar owner that he was aware at pertinent times that one defendant has been recently indicted for unrelated incident of extortion; and (3) jurisdictional requirement of effect on interstate commerce was fulfilled.

Affirmed.

Andrew B. Bowman, Westport, Conn., for appellant Gus Curcio.

David S. Golub, Stamford, Conn. (Leora Herrmann, Silver, Golub and Sandak, Stamford, Conn., of counsel), for appellant James Hawley.

John H. Durham, New Haven, Conn., U.S. Dept. of Justice, (Alan H. Nevas, U.S. Atty., D. Conn., William A. Keefer, U.S. Dept. of Justice, New Haven, Conn., of counsel), for appellee.

Before VAN GRAAFEILAND, MESKILL and WINTER, Circuit Judges.

WINTER, Circuit Judge:

Defendants appeal from a conviction for attempting to violate the Hobbs Act, 18 U.S.C. Section 1951 (1982), after a jury trial before Judge Burns. We reject their various claims of error during the trial and affirm.

BACKGROUND

The prosecution's case concerned events that occurred on June 2, 1982, at the Blue Ribbon Tavern in Bridgeport, Connecticut, an establishment owned by one William Kozakiewicz. Earlier that day, his borther-in-law had purchased a video game in New Jersey and had installed it in the Blue Ribbon. The Blue Ribbon already contained a pool table and pinball machine owned by Kozakiewicz and a juke box and another pinball machine rented from Hawley Enterprises. Hawley Enterprises was

engaged primarily in the business of renting vending machines and was owned principally by the defendant Gus Curcio. The defendant Hawley and an employee of the Hawley firm, one Dahill D'Onofrio, were also part owners.

The government's proof showed that at approximately 10:45 p.m. on June 2, the two defendants, along with D'Onofrio and two others, double parked a Cadillac El Dorado near the Blue Ribbon. Hawley and one of the occupants of the car entered the bar. Although the defense disputes the sufficiency of the government's identification evidence, a reasonable jury could have concluded that the other person was the defendant Curcio. After entering, Hawley stood in doorway, drew a .357 magnum revolver, and warned the patrons of the Blue Ribbon not to move. Curcio, who had a plastic bag over his

hand, smashed the new video game with a sledge hammer he had brought with him. Leaving the hammer imbedded in the game, the defendants exited the bar and returned to the El Dorado.

While the defendants were running towards their car, a Bridgeport Police Department patrol car came down the street. The officers in the car saw two individuals running towards the double parked El Dorado and a crowd milling around in front of the bar. After a patron yelled that the two men running down the street had just smashed up the bar, the officers pursued the now moving El Dorado. Notwithstanding the pursuit by a police car with flashing lights, the El Dorado proceeded for three and one half blocks and ran one stop sign before pulling over. Curcio then got out of the car from the driver's seat and told the

police officers that they could not arrest him because he was Gus Curcio, Unpersuaded, the police officers arrested him and his compatriots. A search of the car revealed a .357 magnum registered to Hawley, a .38 revolver registered to another occupant and Hawley employee, Kent Toresso, and a plastic bag. Both guns were loaded with hollow point bullets.

The next day the video game was removed from the Blue Ribbon. Since that time, Kozakiewicz, who reluctantly testified that he "got the message,"[1]

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1. In a post trial memorandum, the district court stated:
The restaurant owner Kozakiewicz, called as a government witness, testified favorably to the defendants but at odds with his previous testimony before the grand jury. The jury could have found, as the court would have, that much of his courtroom testimony was incredible. While he testified, Kozakiewicz's hands shook; he sat uneasily in the witness box; and he avoided looking in the direction of the defendants' table. Nevertheless, and albeit with with apparent reluctance, Kozakiewicz testified, and the jury could believe, he had "got the message" not to use any non-Hawley machines.

has obtained vending machines only from Hawley Enterprises, except for one machine rented from a Bridgeport police officer.

Hawley took the stand in his defense and admitted that he went into the bar and pulled his gun. However, he stated that he went into the bar with D'Onofrio, not Curcio, and that he was there to buy cigarettes, not smash the video game. He stated that D'onofrio smashed the machine for no apparent reason, and he had pulled his gun only because he thought the patrons were going to attack D'Onofrio.

D'Onofrio then took the stand and also testified that he and Hawley, not Curcio, had gone into the bar. He stated that he went into the bar to discuss wholesale cigarettes with the owner and got upset when he couldn't locate the owner. He testified that he had noticed

the video game on his way in and thought it was owned by Hawley Enterprises. Frustrated in his search for the owner, D'Onofrio claimed to have decided to see how much money was in the machine, and because someone was playing the machine, he became further aggravated and grabbed a hammer from behind the bar which he used to smash the game.

D'Onofrio, whose version of events was bizarre, if not implausible on its face, was contradicted in numerous material particulars by other witnesses. Moreover, he admitted that a state court plea bargain in the Blue Ribbon incident had resulted in no additional time being added to sentences he was already serving for unrelated crimes. He also conceded that he could no longer be prosecuted for smashing the video game.

The government attempted to cross-examine both witnesses regarding two other incidents involving non-Hawley vending machines in local bars. According to the government's offer of proof, each incident involved a bar which had a Hawley vending machine but wanted it removed because the machine was not working. When Hawley failed to repair the machines, both bars then removed the Hawley machine from the premises after so advising the Hawley company. One bar replaced the Hawley machine with a machine from a competitor. Four masked gunmen vandalized one of the bars and beat up the bartender shortly after the Hawley machine was removed. In the case of the other bar, a masked gunman smashed the non-Hawley machine. However, the government conceded that the only evidence directly linking Curcio, Hawley

or D'Onofrio to either incident was a threatening phone call in the case of the second bar by a caller identifying himself as Gus Curcio.

In a colloquy with the court, the government argued that evidence of these incidents was admissible under Fed.R.Evid.R. 404(b)[2] to show criminal intent and the lack of a mistake in the destruction of the video game at the Blue Ribbon. The government stated its intention, should the district court rule favorably to it, to provide witnesses to testify about these incidents should cross-examination fail to elicit

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2. Rule 404(b) states:
(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of notice, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

satisfactory answers. Defendants offered numerous arguments against both cross-examination and admission of extrinsic evidence, their principal claims being that the prejudicial effect of the jury's learning of the other incidents outweighed any probative value and that neither Rule 404(b) nor Rule 608(b)[3] applied because of the lack of any direct proof implicating Hawley or D'Onofrio in the incidents. The court thereupon permitted the government to cross-examine

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3. Rule 608(b) states:
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

about the other incidents but indicated its view that a factual basis for the cross-examination had to be shown in the government's rebuttal.

The cross-examination thereupon proceeded, and Hawley admitted that a Hawley machine had been removed from one of the bars in question but denied knowledge of a dispute. He also denied knowledge of any business dealings with the other bar. D'Onofrio admitted that Hawley machines had been removed from both bars but also denied knowledge of any dispute in either case.

As already mentioned, the government represented that it would offer witnesses to the two incidents, and the district court permitted the cross-examination in light of that representation. However, the government had not subpoenaed the witnesses in question at the start of the

trial, apparently because such evidence would be inadmissible as part of its main case under United States v. Figueroa, 618 F.2d 934 (2d Cir. 1980) (evidence of similar crimes refuting the possibility of mistake or lack of intent not admissible until such matters are put in issue). Once it became clear that the testimony of these witnesses might be admitted, the government attempted to locate them but they could not be served with process. After the government informed the court that the witnesses had "gone into hiding," the district court struck the cross-examination and admonished the jury to disregard it.

DISCUSSION

The principal issue on this appeal is the propriety of the cross-examination of Hawley and D'Onofrio with regard to other

incidents of violence directed at taverns which had caused Hawley machines to be removed. Defendants argue that the government's failure to present evidence either of the incidents or of the defendants' or D'Onofrio's involvement therein renders the cross-examination impermissible as lacking a basis in fact and as irrelevant. We disagree.

Dealing first with the question of whether the cross-examination was factually unfounded, we note that the issue is not resolved by the government's failure to offer live testimony in support of the factual assumptions underlying the questions. That failure was satisfactorily explained by the disappearance of the witnesses in question, and no claim is made that in fact they were available at the pertinent time. The issue is rather whether the

government had in its possession sufficient evidence of the incidents in question to justify posing questions based on such damaging factual assumptions, see ABA Standards Relating to the Administration of Criminal Justice: The Prosecution Function, Section 5.7(d).

We have examined the record, including the Jencks material turned over to the defense before trial, and have concluded that a good faith and objectively reasonable basis for the cross-examination clearly existed. FBI and local police investigative reports relating to both incidents, and grand jury testimony with regard to one incident, provided ample grounds to believe that disputes over Hawley machines had resulted in violence in the bars in question. This material was

available to the defense before the cross-examination got under way, and the only objection made as to the factual predicates for the questions related to the lack of proof that the defendants or D'Onofrio had committed or ordered the violent acts. However, because the questions contained no implications about any such direct involvement, this objection went to relevance rather than to a lack of a good faith factual foundation for these questions. We reject, therefore, the claim that the cross-examination was factually unfounded.

We also reject the claim that it was irrelevant or unduly prejudicial. It is true that there is no direct evidence that Hawley or D'Onofrio either ordered or committed the violence on the prior occasions. The cross-examination was not

intended to demonstrate any such direct involvement. however, but rather to probe into the plausibility of the version of events at the Blue Ribbon given at trial by Hawley and D'Onofrio. Hawley was a part owner and President of Hawley Enterprises. D'Onofrio was also a part owner and a self-described "problem solver" for the firm. There was evidence that each was aware of the location of Hawley machines and intimately familiar with the business of the firm. Under such circumstances, cross-examination with regard to prior violence reasonably designed to forestall competitive inroads on Hawley Enterprises' business was a proper testing of the credibility of the spur of the moment, crime of passion version of events at the Blue Ribbon. If the jury were to accept the testimony that D'Onofrio rather than Curcio

destroyed the machine, it might reasonably consider why the prior incidents had not alerted Hawley and D'Onofrio to the peculiar vulnerability of dissatisfied Hawley customers to violence and led them to have behaved more cautiously at the Blue Ribbon, if not to have avoided it altogether. While the relationship of such prior incidents to the events at the Blue Ribbon would normally be attenuated (apart from proving the element of instilling fear), the unusual version of those events offered by the witnesses justified the cross-examination to test the claimed lack of intent. Since Judge Burns instructed the jury to disregard the questioning, defendants obtained a ruling more favorable than warranted.

Turning now to other claims of error, Curcio argues that the government

should have been forbidden to elicit testimony from the bar owner that he was aware at pertinent times that Curcio had been recently indicted for an unrelated incident of extortion. Recognizing that evidence of an extortion victim's state of mind is relevant in Hobbs Act cases, United States v. Kennedy, 291 F.2d 457,458 (2d Cir. 1961), Curcio argues that he was charged only with attempted extortion and the government did not have to prove that Kozakiewicz was placed in fear. Were such evidence indeed not necessary, its prejudicial value would then outweigh its probative effect.

However, there is no authority for the proposition that evidence of a defendant's reputation known to the victim is inadmissible when attempted extortion, as opposed to extortion, is charged. To the contrary, an effort to

instill fear is a necessary requirement in extortion cases under 18 U.S.C. Section 1951, and a failure to prove such an effort, even when only an attempt is charged, would lead to a directed verdict for the defendant. United States v. Gambino, 566 F.2d 414, 419 (2d Cir. 1977), cert. denied, 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed.2d 802 (1978); Carbo v. United States, 314 F.2d 718, 741 (9th Cir. 1963), cert. denied, 377 U.S. 953, 84 S.Ct. 1626, 12 L.Ed.2d 498 (1964).

Curcio also raises as error the district court's denial of his motion in limine to prevent the government from introducing a recent unrelated loansharking conviction to impeach him should he take the stand. However, he neither testified at trial nor made an offer of proof regarding the content of his testimony and, as a result, failed to

preserve the error. Luce v. United States,--U.S.--, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984).

Both appellants argue that the jurisdictional requirement of 18 U.S.C. Section 1951, proof of an effect on interstate commerce, was not fulfilled. The district court found the requisite effect in the evidence that the bar purchased liquor and other commodities in interstate transactions. We agree with that conclusion. The effects on interstate commerce of the defendants' extortionate behavior need only be "potential or subtle." United States v. Angelilli, 660 F.2d 23, 35 (2d Cir. 1981), cert. denied, 455 U.S. 910, 945, 102 S.Ct. 1258, 1442, 71 L.Ed.2d 1449 (1982). Moreover, the appellants were charged with attempted extortion, and an actual effect need not be shown, only a

possibility thereof. See United States v. Jannotti, 673 F.2d 578, 592 (3d Cir. 1982) (some "threatened effect"), cert. denied, 457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982); United States v. Rosa, 560 F.2d 149, 153 (3d Cir.) (jurisdiction for attempt exists when acts, if completed, would have some effect), cert. denied, 434 U.S. 862, 98 S.Ct. 191, 54 L.Ed.2d 135 (1977). Given that extortionate activities directed at the bar might well affect its interstate purchases, the government's evidence, if credited, was sufficient as a matter of law.

Appellants also argue that the effect on interstate commerce was for the jury to determine, not the district court. Again we disagree. The district court must determine whether the evidence adduced is sufficient as a matter of law

to fulfill the jurisdictional requirement of the statute. United States v. Augello, 451 F.2d 1167, 1170 (2d Cir. 1971), cert. denied, 405 U.S. 1070, 92 S.Ct. 1518, 31 L.Ed.2d 802 (1972). Whether that evidence is to be credited is for the jury and was properly submitted to it in the instant case.

Finally, appellants argue that there was insufficient evidence to support their convictions. This contention is utterly without merit.

Affirmed.

APPENDIX B:

ORDER OF THE SECOND CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 84-1263

United States of America,
Appellee,

versus

Gus Curcio and James G. Hawley,
Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Appellant, James G. Hawley.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,

ELAINE B. GOLDSMITH

CLERK